(1)

Supreme Court, U.S.
FILED

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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES

ELKANAH REID,

Petitioner

v.

M. FRANCES M. HOLMES, as District Director, Immigration and Naturalization Service, Upstate New York District Office; JANET RENO, as Attorney General of the United States; DORIS MESISSNER, as Commissioner of the Immigration and Naturalization Service,

Respondents.

On Petition for a Writ of *Certiorari*
To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether §511(a) of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat 4978, 5052, enacted November 29, 1990, as technically amended by Pub. L. 102-232, 105 Stat 1733, was impermissibly applied retroactively to preclude Reid from eligibility for a waiver of deportation under §212(c) of the Immigration and Nationality Act, 8 U.S. C. §1182(c), where he was convicted of a disqualifying crime in 1989.

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OPINIONS AND ORDERS BELOW

The opinion of the Federal District Court for the Western District of New York is unreported and is reprinted in Appendix B. The decision of the United States Court of Appeals for the Second Circuit of New York is reported at 323 F 3rd 187 and is reprinted in Appendix A. The order denying petitioner's request for rehearing en banc is reprinted in Appendix C.

STATEMENT OF JURISDICTION

On March 21, 2003 a panel of the United States Court of Appeals for the Second Circuit entered judgment affirming the order of the United States District Court for the Western District of New York denying the petitioner's application for a writ of habeas corpus. App 1a. The district court had dismissed the petition by decision and order filed April 25, 2002. App 6a. By order entered July 3, 2003 the Second Circuit denied Reid's petition for rehearing en banc.

This court has jurisdiction to review under 28 U.S.C.§§1254(1) and 2241. See *INS v St. Cyr,* 533 US 289, 2001, *INS v Calcano-Martinez*, 533 US 348 (2001).

RELEVANT STATUTES

8 U.S.C. §1182, INA§212 excludable aliens;[1]

(c) Non-applicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful un-

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1. Repealed by §304(b) of the IIRIRA of 1996.

relinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) (9) (C)). Nothing contained in this section shall limit the authority of the Attorney General to exercise his discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years.

28 U.S.C. §1254. Courts of Appeals; certified questions;

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C.§2241. Power to grant writ.

(a) Writs of habeas corpus may granted by the Supreme Court, any justice thereof, the District Courts and any Circuit Judge within their respective jurisdictions . . . .

Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat at 4469-4470.

The term "aggravated felony" means . . . any drug trafficking crime as defined in §924(c)(2) of title 18, U.S.C. . . . or any attempt or conspiracy to commit any such act, committed within the United States."

Immigration Act of 1990, (IMMACT) Pub. L. No. 101-649, 104 Stat 4978, 5052, enacted Nov. 29, 1990, as technically amended by Pub. L. 02-232, 105 Stat 1733,

§511 limitation on waiver of exclusion for returning permanent residents convicted of an aggravated felony.

(a) In general. - Section 212(c) (8 U.S.C. 1182(c)) is amended by adding at the end the following: "The first sentence of the subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served a term of imprisonment of at least five years.".

(b) Effective date. - The amendment made by subsection (a) shall apply to admissions occurring after the date of the enactment of this act.

Anti-Terrorism & Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 279,

§440(d),

Classes of excludable aliens. - §212(c) of such act (8 U.S.C.1182(c)) is amended -

(1) By striking "the first sentence of this" and inserting "This"; and

(2) By striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)."

Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (IIRIRA), Division C of the Department of

Commerce, Justice & State, the Judiciary Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009, §304(b)

Removal proceedings:

Cancellation of removal:

Sec. 240(A)(a) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS. - The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien

- . . .

(3) has not been convicted of any aggravated felony.

Sec. 309. Effective Dates: Transition.

(A) In General. - Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

New York Penal Law §220.41. Criminal Sale of a Controlled Substance in the Second Degree.

A person is guilty of criminal sale of controlled substance in the second degree when he knowingly and unlawfully sells:

(1) One or more preparations, compounds, mixtures or substances containing a narcotic drug and the preparations, compounds, mixtures or substances are of an aggregate weight of one half ounce or more;

New York Penal Law §220.18. Criminal Possession of a Controlled Substance in the Second

Degree.

A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possess:

(1) One or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparation, compounds, mixtures or substances are of an aggregate weight of two ounces or more.

STATEMENT OF THE CASE

A Jamaican citizen, Reid originally came to the US as a farmworker in 1981. He was adjusted to the status of US lawful permanent resident in 1983. App A 2a.

On February 15, 1989 he was convicted after a nonjury trial in the County Court, Monroe County, NY, of Criminal Sale of a Controlled Substance in the Second Degree, New York Penal Law §220.41, and Criminal Possession of a Controlled Substance in the Second Degree, New York Penal Law §220.18, and sentenced to concurrent indeterminate terms of imprisonment with a minimum of five years and a maximum of life. App A 1a. He in fact served five years before being released on parole.[2]

About four months prior to his convictions, on November 18, 1988, Congress enacted the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, subtitle J, 102 Stat. 4181, which created the concept of aggravated felony in the immigration law, and included drug trafficking within its

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2. Although Reid had contended below he in fact served less than five years, he is now conceding that issue.

definition. Reid's sale conviction brought him within the definition. Although the legistation created new grounds for deportability, including aggravated felony conviction, it did not initially effect his eligibility for a waiver of deportation under §212(c) of the Immigration and Nationality Act.

Congress again amended the law November 29, 1990 with the enactment of the Immigration Act of 1990 (IMMACT) Pub. L. 101 649, 104 Stat. 4978. That legislation at §511(a) eliminated eligibility for §212(c) relief for aggravated felons incarcerated for five years or more. At §511(b) it provided that the statutory bar "shall apply to admissions occurring after the date of the enactment of [the] Act."

By Order to Show Cause dated June 7, 1993, Reid was charged with deportability, as a result of his criminal conviction. App A 7a. Two years later, on August 21, 1995, the immigration court found him deportable as charged and ordered him deported to Jamaica. App A 7a.

In 1996 Congress enacted additional pertinent immigration legislation, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, 110 Stat. 279, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of the Department of Commerce, Justice and State and the Judiciary Appropriations Act of 1997, Pub.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

Although those acts are not directly implicated in this case, they gave rise to a series of important legal decisions that now govern inquiry into whether a statute will be interpreted retroactively, that is, to implicate conduct which occurred prior to it's enactment. Those decisions are

pertinent to the question of whether IMMACT §511 should be interpreted to have retroactive affect.

On March 2, 2000, the Board of Immigration Appeals (BIA) ultimately dismissed Reid's appeal. App A 7a.

By petition dated February 28, 2001 Reid filed for a writ of habeas corpus with the District Court for the Western District of New York, which dismissed it, by decision and order filed April 25, 2002 on the authority of *Buitrago-Cuesta v INS*, 7 F 3rd 291 (2nd Cir.1993). App 6a. A panel of that court consisting of Circuit Judges Meskill, Cardamone and Cabranes, affirmed by per curiam decision dated March 21, 2003. App 1a.

By order filed July 3, 2003, the Second Circuit denied the respondent's timely petition for rehearing *en banc*. App 13a.

The basis for federal jurisdiction in the court in the first instance is 28 U.S.C.§2241. This court has jurisdiction to review by writ of certiorari pursuant to 28 U.S.C. §1254(1). See *INS v St. Cyr*, 533 US 289 (2001); *Calcano-Martinez v INS*, 533 US 348 (2001).

REASONS FOR GRANTING THE PETITION

To resolve an inconsistency between the circuits, and reconcile inconsistent lines of case law, this court should consider whether IMMACT §511(a), barring waivers of deportation to aliens who have served prison terms as aggravated felons for at least five years, applies retroactively.

This case presents this court with the opportunity to rectify an inconsistency between the circuits and to reconcile inconsistent lines of case law going to the interpretation of separate, though closely related, statutory enactments. One is §440(d) of the Anti Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat.279. The other is §511(a) of the Immigration Act of 1990 (IMMACT), Pub. L. No. 649, 104 Stat. 4978.

At issue is a question of transcending importance: how to harmonize the method to determine whether a statute has retroactive temporal reach. Although this court set out the definitive tests, while considering the AEDPA provision in *INS v St. Cyr*, 533 US 289 (2001), an earlier body of inconsistent case law typified by the Second Circuit Court of Appeals decision in *Buitrago-Cuesta v INS* persists as facially valid law. *Buitrago*, indeed, controlled the decision at issue here. Under *St. Cyr* analysis the decision would likely have gone the other way. Application of the old *Buitrago* analysis led to an unjust result and the perpetuation of incorrect doctrine.

Thus *Buitrago* is problematic because it articulates an outdated approach to analyzing statutes for retroactivity,

while discordant, at least, to several circuit court cases, such as *Angulo-Dominiquez v Ashcroft*, 290 F 3rd 1147 (9th Cir. 2002).

The narrow question at bar is whether §511(a) of IMMACT, 1990 statute barring aliens convicted of aggravated felonies who were sentenced to and served at least five years' imprisonment from eligibility for deportation waivers, acts retroactively to bar persons convicted prior to the statute's enactment.

After Reid's conviction but before he was put into immigration proceedings, Congress adopted the Immigration Act of 1990, Pub.L.101-649, 104 Stat.4978, 5052 (IMMACT) (effective Nov. 29, 1990). At §511(a) that act included a section entitled *Limitation on Waiver of Exclusion for Returning Permanent Resident Aliens Convicted of Aggravated Felony.* The section provided:

> (a) In general. §212(c) (8 USC1182(c)) is amended by adding at the end the following: The first sentence of this subsection [authorizing certain aliens to apply for the waiver] shall not apply to an alien who has been convicted of an aggravated felony and who has served the term of imprisonment of at least five years.
>
> (b) Effective date. The amendment made by subsection (a) shall apply to admissions occurring after the date of the enactment of this act.

After the immigration court pretermitted his application on the ground of statutory ineligibility under §511(a), Reid timely appealed to the Board of Immigration Appeals (BIA), which dismissed the appeal March 2, 2000. Reid then filed a petition for a writ of habeas corpus with the Federal District Court for the Western District of NY, which

dismissed it by decision dated April 25, 2002. App 6a.

Affirming the District Court, the Second Circuit followed *Buitrago-Cuesta*. It recognized Reid's argument that the holding has been questioned by recent cases including the Supreme Court in *St. Cyr,* "but none of the cases he cites speak directly to the issue at hand." *Reid v Holmes*, 323 F 3rd 187. The decision made no further analysis of whether to apply the statute retroactively under the various *St. Cyr* tests.

In *Buitrago* the court rejected the contention that IMMACT §511 should not be applied retroactively to bar an alien from INA §212(c) eligibility based on a conviction suffered prior to the statute's enactment. The court observed that the time the Supreme Court's position on the retroactivity of civil statutes was 'somewhat unclear,' citing *Morgan Guaranty Trust Company v Republic of Palau*, 971 F 2nd 917, 921 (2nd Cir. 1992). It recognized that the language going to effective date allowed for a prospective application interpretation. It rejected that interpretation, however, because it would have delayed action for years, which the court thought inconsistent with Congress' manifest intent to proceed expeditiously against aggravated felons. The Court said it believed "the only sensible" interpretation is that Congress intended its directions to the Attorney General to go into effect promptly at the date of enactment.

Courts differ on the issue of §511's retroactivity. For instance, in *Samaniego-Maraz v INS,* 53 F 3rd 254, 256 (9th Cir. 1995) the court held that §511 is silent about whether it applies retroactively; accord, *DeOsorio v INS,* 10 F 3rd 1034, 1041 (4th Cir. 1993). But see *Campos v INS,* 16 F 3rd 118, 122 (6th Cir. 1994), holding that the bar applies retroactively. In *Toya v Fasano*, 334 F 3rd 917, 920 (9th Cir. 2003) the court

observed that disagreements on the interpretation of §511 throughout the circuit court suggests the section does not reflect the requisite clear Congressional intent. See *DeCardenas v Reno*, No.3:00 CV (SRU) 2003, US Dist. Conn LEXIS 14019, Aug. 8, 2003, (questioning *Buitrago*, distinguishing *Reid v Holmes*, and holding §511 applies prospectively where the alien, unlike Reid, had pleaded guilty).

The Ninth Circuit in *Angulo-Dominquez v Ashcroft*, 290 F 3rd 1147 (2002) reached a conclusion tending to conflict with *Buitrago-Cuesta*, although it does not cite the case by name. There the court citing, this court's landmark *St. Cyr* decision, held that where the petitioner would have been eligible for §212(c) relief when he pled guilty prior to the enactment of §511(a), applying that section to bar the waiver application may have had, an impermissibly retroactive effect. The court, following *St. Cyr*, reasoned that the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance and settled expectation. Although *St. Cyr* was concerned with the retroactive application of AEDPA and IIRIRA whereas *Angulo* concerned the retroactive application of IMMACT, the court reasoned the same principles applied to preserve §212(c) eligibility under IMMACT, where the conviction at issue predated the disqualifying enactment.

It noted that in *St. Cyr* the court held the retroactive application of AEDPA unwarranted because Congress failed to direct with requisite clarity that the law applied retroactively, and that the application would have had a genuine retroactive effect in that it attached a new disability

to an alien who entered a guilty plea with the expectation that he would be eligible for the relief. It noted that *Angulo* had such an expectation when he entered his guilty plea.

Because the district court had ruled against *Angulo* on the retroactivity issue prior to the Supreme Court *St. Cyr* decision, it remanded the case to the district court to reconsider it in light of that decision. (The case has no subsequent appellate history.)

In this case, rejecting the contention that §511(a) should not have been applied retroactively, the court noted that it, in *Buitrago-Cuesta,* and other courts, had concluded otherwise. The court also rejected the contention that the Second Circuit's decision in *St. Cyr v INS,* 299 F 3rd 406 (2000), and its Supreme Court affirmation, *sub nom INS v St. Cyr,* 533 US 289 (2001), undermined *Buitrago's* viability.

The court's reliance on *Buitrago-Cuesta* is misplaced.

Since *Buitrago,* the Second Circuit itself recognized that the law had changed since it issued that decision. In its *St. Cyr,* 299 F 3rd 406 (2nd Cir. 2000) decision, the court wrote, "Since we decided *Buitrago-Cuesta*, however the Supreme Court has decided *Landgraf*, [511 US 244 (1994)], *Hughes Aircraft,* 520 US 939 (1997), and *Martin* [527 US 343, 352 (1999)] cases that honed retroactively principles." *Id.* at 420.

This court's specific ruling in *St. Cyr* was that §212(c) relief remains available to aliens whose convictions were obtained through plea agreements and who would have been eligible for such relief under the law at the time the pleas was made because IIRIRA §304 became effective prospectively. Although the decision was concerned with IIRIRA, not IMMACT §511, its logic applies to the earlier enactment as

well.

In *St. Cyr* this court following its analysis in *Landgraf v USI Film Products,* 511 US 244 (1994), held that the bars on applying for discretionary relief from removal under §§440(d) of AEDPA and 304 of IIRIRA do not apply to aliens who pled guilty or *nolo contendere* to an otherwise qualifying crime prior to enactment because such application would upset reasonable settled expectations and change the legal effect of prior conduct.

It rejected as a matter of statutory interpretation the government's contention that Congress unambiguously expressed the intent that IIRIRA's provision apply to all removals begun after the statute's effective date. Justice Stevens writing for the majority, reasoned that because retroactive statutes raise special concerns of fairness, the court will not read the Congressional intent to have retroactive effect unless its language requires this result. *INS v St. Cyr, supra,* 533 US 289, 315. Justice Steven cited Justice Scalia's language in a concurrence, in *Kaiser Aluminum & Chemical Corp. v Bonjorno,* 494 US 832, 855 (1990), stating the presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine older than our republic, that elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly, that settled expectations should not be lightly disrupted, and that the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place, has a timeless and universal human appeal. *Id.* at 316.

Thus, Justice Steven noted, situations in which the court has found retroactively "have involved statutory

language that was so clear that it could sustain only one interpretation, citing *Lindh v Murphy,* 521 US 320, 328 (1997). Rejecting the government's argument that IIRIRA had achieved that level of clarity, the court said the promulgation of an effective date was not enough to demonstrate that Congress had specifically considered the potential unfairness that could result from retroactive application of the repeal of §212(c). Quoting from *Landgraf,* the court wrote, "A 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'" *Id.* at 317.

In addition, the court cited the principle in *INS v Cardoza-Fonseca,* 480 US 421, 449 (1987), that "lingering ambiguities in deportation statutes" are to be read in an alien's favor. *Id.* at 321.

Citing the "obvious and severe" effect of applying the statute retroactively against the petitioner, the court found nothing in IIRIRA "unmistakably indicating that Congress considered the question whether to apply its repeal of §212(c) retroactively to such aliens." Accordingly the court held that "§212(c) relief remains available to aliens, like respondent, whose convictions were obtained through plea agreements and who, not withstanding those convictions, would have been eligible for §212(c) relief at the time of their pleas under the law then in effect." *Id.* at 326.

In *St. Cyr* this court affirmed a Second Circuit decision that, though grounded in statutory interpretation, has constitutional underpinnings. There the court said in a footnote:

> In some cases, the interest in avoiding

> constitutional questions will cause a court to refrain from applying a statute retroactively . . . Our holding in this case is guided, in part, by that principle. Even when Congress clearly intends that legislation is to be applied to past conduct, Congress' broad power to enact retroactive legislation does not go completely unchecked. The Fifth Amendment Due Process Clause places a narrow limit on Congress's power to sweep away citizens' settled expectation under the law. The Constitution's safeguard against retroactively is especially appropriate where it protects an unpopular group or individual . . . . Because, in our view, a profound constitutional question would arise under the Fifth Amendment's Due Process Clause were we to interpret IIRIRA as precluding the availability of §212(c) relief in cases where an alien pled guilty or *nolo contendere* in reliance on the availability of §212(c) relief, our ruling today that IIRIRA §304 does not apply retroactively to pre-enactment guilty pleas avoids this result. *St. Cyr v INS, supra*, 229 F 3rd 406.

IMMACT's §511 language is at least as ambiguous as the IIRIRA §304(b) language. The principles going to retroactivity articulated in *St. Cyr* apply to IMMACT §511 as well.

Thus the §511(b) effective date language providing that it "shall apply to admissions occurring after the date of the enactment of this act [Nov. 29, 1990]", 104 Stat at 5052, "does not even arguably suggest it has any application to conduct that occurred at an earlier date." *INS v St. Cyr.*,

supra 533 US at 317.

Moreover, as the petitioner contended in *Buitrago-Cuesta,* 7 F 3rd 291 (2nd Cir 1993) §511 by its terms, applies to admission occurring after the date of enactment. If §511 applied to admissions taking place on the date of enactment, therefore it would necessarily apply retroactively because §511 could not apply on that date absent a conviction prior to that date. Consequently, the language providing that §511 applies only to admission after the enactment date suggests it effects only aliens convicted of aggravated felonies after that date.

Further, the use of the word "admission" as a trigger in §511 raises another ambiguity. "Admission" means the physical entry of an applicant into the United States with permission, following the basic rule of statutory construction that the starting point for interpreting a statute is the language of the statute itself, absent a clearly expressed legislative intent to the contrary, see *INS v Phinpathya*, 464 US 183, 189 (1984); *Consumer Safety Commission v GTE Sylvania Inc.*, 447 US 102, 108 (1980). Arguably the section does not apply to waiver of deportation at all because the applicant would necessarily have been admitted to the US at an earlier time. Had Congress intended the word to mean an application for §212(c) relief in deportation proceedings, it would have so stated in the statute. See Rosenburg & Sabagh, A Practitioner's Guide to INA §212(c), *Immigration Briefings* No. 93-04 (April 1993). They write:

> Section 212(c) relief has been available in the deportation proceedings for over 15 years and Congress has presumed to know its availability in

> deportation proceedings. In fact, a conviction of an aggravated felony is a ground only of deportability - not excludability. Congress could have simply stated that the new provisions would be effective for all 212(c) applications after the date of enactment, but Congress did not do so.

It is, therefore, almost an understatement to say the language is obviously not so clear as to sustain only one interpretation.

Although the *St. Cyr* case involved a guilty plea made in reliance upon the alien's eligibility for a §212(c) waiver, whereas, Reid was convicted after trial, the distinction fades into insignificance upon analysis.

If the statutory enactment is prospective, that settles the matter. The question of the alien's expectations is logically irrelevant.

Even if settled expectation were critical, however, Reid would qualify. In this area, there is a logical distinction in analysis between the IMMACT and the AEDPA cases.

When Reid made his choice, there was no five-year imprisonment bar. Whether he was convicted after trial or after a plea, and no matter what the sentence, he had the expectation of §212(c) availability. It was only after the enactment of IMMACT §511 that the length of sentence became pertinent to §212(c) eligibility. Thus the significance of *St. Ctr's* reliance on the existence of §212(c) eligibility in determining to plead guilty in his criminal case, is irrelevant to Reid's situation. Reid would have had to have been prescient in the late 1980s, when he elected to go to trial, to have to have considered the implications of a statute that did

not exist. In reality, Reid, like *St. Cyr*, had the same settled expectation that §212(c) would be there for them down the road.

In sum, to reconcile the two lines of cases, promote uniform application of the rules of interpretation of the laws generally, and in the interest of justice in this particular case, this court should consider the question.

CONCLUSION

For all these reasons this petition should be granted.

Respectfully submitted,

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September 28, 2003

APPENDIX A - DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 21, 2003 AFFIRMING DISTRICT COURT ORDER DENYING PETITION FOR HABEAS CORPUS WRIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2002

(Argued: March 11, 2003 Decided: March 21, 2003)

Docket No. 02-2318

ELKANAH REID,
Petitioner-Appellant,
v.
FRANCIS M. HOLMES, as District Director of the Immigration & Naturalization Service, Upstate New York District Office; JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration & Naturalization Service, Respondents-Appellees.

Before: MESKILL, CARDAMONE and CABRANES, Circuit Judges.

The petitioner appeals from an order entered in the United States District Court for the Western District of New York (David G. Larimer, Judge) denying his petition for a writ of habeas corpus. The District Court held that Reid had served a five year term of imprisonment and, therefore, that § 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, as technically amended by Pub. L. No. 102-232, 105 Stat. 1733, precluded Reid from being able to seek a waiver of deportation pursuant to §212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c).

Affirmed.

STEPHEN M. BRENT,
Brent & Roberts,
Rochester, NY,
for Petitioner-Appellant.

ETHAN B. KANTER, Senior Litigation Counsel (Michael P. Lindemann, Assistant Director, *of counsel,* Robert D. McCallum, Assistant Attorney General, *on the brief),* Office of Immigration Litigation, Civil Division, Department of Justice, Washington, DC., *for Respondent-Appellee.*

PER CURIAM:

Petitioner-Appellant Elkanah Reid is a native and citizen of Jamaica who entered the United States in 1981 and became a lawful permanent resident in 1983. On February 15, 1989, Reid was convicted in the County Court for the County of Monroe, State of New York of unlawful possession and sale of cocaine in violation of New York Penal Law § § 220.18 and 220.41. Reid was sentenced to two terms of imprisonment of five years to life, to run concurrently.

On June 7, 1993, the United States Immigration and Naturalization Service ("INS") commenced a deportation proceeding against Reid as a result of his criminal conviction. On January *25,* 1994, the immigration judge found Reid deportable and ordered him deported to

Jamaica.[1] After a series of appeals and remands, the Board of Immigration Appeals ("BIA") ultimately dismissed Reid's appeal on March 2, 2000.

On September 21, 2000, Reid filed a petition for a writ habeas corpus pursuant to 28 U.S.C.§ 2241 in the United States District Court for the Western District of New York. The District Court (David G. Larimer, Judge) denied Reid's petition on April 25, 2002.

In his petition, Reid first argued that the immigration court erred by retroactively applying § 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, as technically amended by Pub. L. No. 102-232, 105 Stat. 1733, to preclude Reid from being able to seek a waiver of deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). The District Court held that this argument was barred by our decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993). We agree: Our opinion in *Buitrago-Cuesta* clearly established that § 511(a) of the Immigration Act of 1990 could be applied retroactively to aliens whose criminal convictions pre-dated the statute's enactment. 7 F.3d at 294. *Cf Rankine v. Reno*, 319 F.2d 93 (2d Cir. 2003) (the repeal of §212(c) applies retroactively to an alien who was convicted, following trial, of an aggravated felony while §212(c) was still in effect).

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1. Following the passage of the Illegal Immigration Reform and Responsibility Act, pub. L. No. 104-208, 110 Stat. 3009 (1996), the term "removal" is now used in place of the term "deportation." Because the immigration judge ruled before the effective date of this Act, however, he properly employed the various forms of the word "deport" rather than those of the term "remove."

Reid argues that our holding in *Buitrago-Cuesta* has been called into doubt by more recent Supreme Court cases including *INS v. St. Cyr*, 533 U.S. 289 (2001), but none of the cases he cites speak directly to the issue at hand. Accordingly, to the extent that Reid asks us to revisit this issue, we are obligated to decline. See, e.g., *United States v. Curcio,* 712 F.2d 1532, 1542 (2d Cir. 1983) (holding that our prior decisions may only be overruled by a decision of the *en banc* Court).

Reid also argues that the immigration judge, the BIA, and the District Court all erred in concluding that he had been imprisoned for five years. Specifically, he claims that he was only imprisoned for four years and 364 days because, on one occasion, he surrendered to authorities from his work furlough program one day late and, under New York Penal Law §70.30(7), the failure to return from work release at a scheduled time interrupts a prisoner's sentence. Because §511(a) of the Immigrations Act of 1990 only eliminated eligibility for §212(c) relief for aggravated felons incarcerated for five years or more, Reid reasons that he was improperly denied an opportunity to seek a waiver of deportation pursuant to § 212(c).

Section 101 (a)(48)(B) of the INA states that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."* 8 U.S.C. § 1101(a)(48)(B) (emphasis added). Accordingly, for purposes of the immigration law, Reid was imprisoned for five years despite his having absconded for one day from work release.

For the foregoing reasons, we affirm the judgment of the District Court.

APPENDIX B - DECISION OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, FILED APRIL 25, 2002 DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELKANAH REID, #A26222 1964,

Petitioner,

DECISION AND ORDER

-vs- 00-C V-6466L(Fe)

M. FRANCIS HOLMES, as District Director of the Immigration and Naturalization Service, JANET RENO, as Attorney General of the United States, DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service, and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

Presently before the Court is petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons that follow, the petition is dismissed.

BACKGROUND

Petitioner Elkanah Reid is a native and citizen of Jamaica. (AR. 133).[1] Petitioner entered the United States in 1981 and became a lawful permanent resident alien in 1983. (AR. 133,403). On February 15, 1989, petitioner was convicted, after a bench trial, of criminal sale of a controlled substance (cocaine) (N.Y. Penal L.§220.41) and criminal possession of a controlled substance (cocaine) (N.Y. Penal L. § 220.21). (AR. 2, 135). Petitioner was

1. References preceded by "AR" refer to pages of the certified administrative record submitted to the Court by respondents.

sentenced to concurrent terms of incarceration of five years to life. (AR.5, 135).

On June 7, 1993, the United States Immigration and Naturalization Service ("INS") commenced a deportation proceeding against petitioner based upon the INS's determination that petitioner was subject to deportation as a result of his criminal conviction. (AR. 398, 400). Following a hearing, at which petitioner was represented by counsel, the immigration judge (IJ) found petitioner deportable as charged and ordered him deported to Jamaica. (AR. 133). On August 31, 1995, petitioner filed an appeal with the Board of Immigration Appeals (BIA). (AR. 126). On March 5, 1997, the BIA issued an Order permitting petitioner to move to re-open the proceedings if, prior to the enactment of AEDPA, he had conceded deportability in reliance on the availability of §212(c) relief. (AR. 53). Petitioner moved to re-open on June 13, 1997. (AR. 46). On August 4, 1997, the BIA granted the motion to re-open but, finding petitioner deportable as charged, dismissed the appeal. (AR. 27). Petitioner filed a petition for review with the United States Court of Appeals for the Second Circuit and, on September 9, 1999, the matter was remanded to the BIA. (AR. 25). On March 2, 2000, the BIA dismissed petitioner's appeal. (AR. 2).

On September 21,2000, petitioner filed the instant habeas corpus proceeding, arguing that: (1) the five-year imprisonment bar, added to the Immigration and Nationality Act ("INA") by §511(a) of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 5052, as technically amended by Pub. L. No. .102-232, 105 Stat. 1773, was applied to his 1989 conviction in an impermissibly

retroactive manner, and (2) that, in any event, petitioner did not serve five years of imprisonment because his aggregate time incarcerated did not add up to five years. Respondent filed a response to the petition (Docket No.7) on February 28,2001. Petitioner filed a reply to the response (Docket No. 9) on April 5, 2001.

DISCUSSION

Petitioner argues that § 511(a) of IMMACT, which foreclosed the possibility of § 212(c) relief for aliens convicted of aggravated felonies who had served prison terms of at least five years, is being applied to his 1989 conviction in an impermissibly retroactive manner. However, as petitioner acknowledges, in 1993 the United States Court of Appeals for the Second Circuit held that IMMACT applied retroactively. *Buitrago-Cuesta v. INS,* 7 F.3d 291 (1993). While petitioner argues that the Second Circuit's decision in *St. Cyr v INS,* 229 F.3d 406(2000), *aff'd,* 533 U.S. 289 (2001),[2] overturns *Buitrago-Cuesta,* this Court does not find petitioner's argument persuasive. In *St. Cyr,* the Supreme Court, relying on the two-part test enunciated in *Landgraf v. USI Film Prods.,* 511 U.S. 244,260-61(1994), found that the language of § 304 of IIRIRA (which eliminated § 212(c) relief) was ambiguous. *St. Cyr,* 533 U.S. at 322-23. The Court then considered whether the retroactive application of §304 would be contrary to considerations of fair notice, reasonable

2.The Court notes that the pleadings in this matter were filed prior to the Supreme Court's decision in *Immigration and Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001).

reliance and settled expectations. *Id.* The Court held that such retroactive application would be unfair to aliens who had pleaded guilty, because "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or go to trial." *Id.* at 323. For that reason, the Court "held that §212(c) relief remains available for aliens, like *St. Cyr*, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for §212(c) relief at the time the plea under the law then in effect." *Id.* at 326. The Second Circuit, and the other courts that have reviewed § 511(a), found no such ambiguity in its language. *See Buitrago-Cuesta,* 7 F.3d 291,294-95; see also *Scheidemann v. INS,* 83 F.3d 1517, 1525-26 (3rd Cir. 1996); *Samaniego-Meraz v. INS,* 53 F.3d 254,257(9th Cir. 1995);*Ascencio v. INS,* 37 F.3d 614,617(11th Cir. 1994) (per curiam); *Campos v. INS,* 16 F.3d 118, 121 (6th Cir. 1994); *De Osorio v. INS,* 10 F.3d 1034, 1039-42(4th Cir.1993). Further, unlike the petitioner in *St. Cyr,* petitioner here was convicted after trial. This Court has reviewed both the Supreme Court and Second Circuit's decisions in *St. Cyr* and finds nothing in either decision that would lead one to the conclusion that *Buitrago-Cuesta* is no longer good law.[3] Further, those courts

3. The Court notes that petitioner argues that St. Cyr's holding shows a reluctance to penalize pre-enactment conduct. However, in Domond v. INS, 244 F.3d 81,84 (2d Cir. 2001), the Second Circuit held that the application of AEDPA where a petitioner's criminal conduct, but not his guilty plea, predated the enactment of the statute was not impermissibly retroactive because it did not upset the "familiar considerations of fair notice, reasonable reliance, and settled expectations." Id. at 85-86. The Court's reasoning is clear, while "an alien is likely to consider the

that have revisited *Buitrago-Cuesta* following the *St. Cyr* decision have uniformly found it to be good law.[4] *See DiSanto V. INS,* 2002 WL 10448, at **3-4 (S.D.N.Y.January 3, 2002) (holding that *Buitrago-Cuesta* remains good law); *Copes v. McElroy,* 2001 WL 830673, at *5 (S.D.N.Y. July 23, 2001) (finding *St. Cyr* inapplicable because the petitioner would not have been entitled to § 212(c) relief under *Buitrago-Cuesta,* and noting that courts who have interpreted § *511(a)* under the principles set forth in *Landgraf,* have held that 511(a) applies regardless of the date of conviction); *Mezrioui v. INS, 154* F. Supp.2d 274,277-78 (noting that the Second Circuit's decision in *St. Cyr* did not overturn *Buitrago-Cuesta).* Petitioner has not pointed to a single decision by any court which, relying on *St. Cyr,* finds that §*511(a)* has an impermissibly retroactive effect. *Buitrago-Cuesta is* the law in this Circuit and this Court must apply it. Accordingly, the Court finds that petitioner is not entitled to habeas corpus relief on this ground.

Petitioner also alleges that the IJ and BIA erred in finding that petitioner had been imprisoned for five years. The

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immigration consequences when deciding whether and how to plead," however, "it cannot. be reasonably argued that aliens 'committed crimes in reliance on a hearing that might possibly waive their deportation." Id. at 86. Thus, the Court finds petitioner's argument regarding conduct to be utterly unpersuasive.

4. The Court notes that, in a recent summary decision, the Second Circuit again stated that § 511(a) applies retroactively, citing to *Buitrago-Cuesta. Levelt v. INS,* 2002 WI. 337806 (2d Cir. March 4, 2002) (table).

Second Circuit has yet to definitively determine the degree of deference to be awarded to the INS' factual determinations on habeas corpus review. However, this Court, like others in this Circuit, finds that the appropriate standard is the substantial evidence standard used by the Second Circuit on petitions for review. *See Ahmed v. Ashcroft*, — F.3d —, 2002 WL 483512 (2d Cir. March 29, 2002) (stating that on a petition for review, the appropriate standard is substantial evidence); *see also Soto* v. *Ashcroft,* 2001 WL 1029130, at *7 (S.D.N.Y. September 7, 2001) (applying substantial evidence standard in dismissing a § 2241 petition). To reverse a finding of fact under the substantial evidence standard, this Court "must find that the evidence not only *supports* that conclusion but *compels* it." *INS v. Elias-Zacarias,* 502 U.S. 478,481, n. 1 (1992) (emphasis in original). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable minds might accept as adequate to support a conclusion." *Purveegiin v. United States INS Processing Ctr.,* 73 F. Supp.2d 411,417-18 (S.D.N.Y. 1999). Petitioner here has not met this standard, both the IJ and the BIA gave a lengthy and well-reasoned explanation of how they calculated petitioner's time of imprisonment. Petitioner offers no arguments critiquing the BIA's or IJ's findings and no new information to show why the factual findings were not supported by substantial evidence. Petitioner has simply restated the same arguments, accompanied by the same exhibits, that were submitted to, and rejected by, the U and the BIA. As petitioner has failed to provide any substantial evidence to show that the finding that he had been imprisoned for five years was erroneous, the Court finds that petitioner is

not entitled to habeas corpus relief upon this ground.

CONCLUSION

Based on the foregoing, the petition is dismissed. I also certify pursuant to 29 U.S.C. §1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore leave to appeal as a poor person is denied. *Coppedge v United States*, 369 U.S. 438 (1962)

IT IS SO ORDERED.

S/
DAVID G. LARIMER
CHIEF JUDGE
United States District Judge

April 25, 2002
Rochester, NY

APPENDIX C - ORDER OF UNITED STATES COURT OF APPEAL FOR SECOND CIRCUIT FILED JULY 3, 2003 DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNTIED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANNE B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 3rd day of July two thousand and three.

Reid,

Petitioner-Appellant, Dkt No: 02-2318

Holmes,

Respondent -Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Elkanah Reid.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

S/_____
Arthur M. Heller,
Motions Staff Attorney